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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ARACELY M., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and JOSHUA M., Appellees.	2 CA-JV 2009-0110 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD2007-00188

Honorable Joseph R. Georgini, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Aracely M. challenges the juvenile court's order terminating her parental rights to her son, Joshua, on grounds of abuse and length of time in care. *See* A.R.S. § 8-533(B)(2), (B)(8)(c). We will not disturb a juvenile court's order terminating parental rights unless it is clearly erroneous. *See Jesus M. v. Ariz. Dep't of Econ Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). We affirm.

¶2 On appeal we view the evidence and all reasonable inferences permitted by the evidence in the light most favorable to upholding the juvenile court's order terminating a parent's rights. *See Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008). Joshua was removed from Aracely's care in October 2007 after he reported she had beaten him with a belt. Aracely was found guilty of child abuse and aggravated assault in a criminal proceeding based on the incident. Meanwhile, the Arizona Department of Economic Security (ADES) filed a dependency petition and placed Joshua first with relatives and then in foster care with foster parents willing to adopt him. The juvenile court adjudicated Joshua dependent in February 2008. The initial case plan of family reunification was changed to severance and adoption at a permanency-planning hearing in October 2008, and the court entered its order granting ADES's subsequent petition to terminate Aracely's parental rights following a three-day hearing conducted in January and May, 2009.

¶3 At the severance hearing, evidence was presented that Aracely had a long history of physically abusing Joshua and failing to protect him from abuse by the father of her other child and by her parents. Evidence also showed that Aracely had failed

throughout the dependency proceeding to "address[] the issues of the abuse" or to modify her behavior. Joshua's therapist testified that he was thriving in his foster placement and that Joshua wanted to be adopted by his foster parents.

¶4 Following the hearing, the juvenile court terminated Aracely's parental rights, pursuant to § 8-533(B)(2) (abuse) and § 8-533(B)(8)(c) (length of time in court-ordered care). On appeal, Aracely challenges the sufficiency of the evidence on the latter ground only. To sever a parent's rights, a juvenile court must find by clear and convincing evidence that any one statutory ground for severance exists and by a preponderance of the evidence that severance is in the child's best interest. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005); *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 25, 971 P.2d 1046, 1051 (App. 1999). Aracely has not challenged the sufficiency of the evidence to support termination of her rights on the ground of abuse or the court's finding that termination was in Joshua's best interests. And in order to affirm an order terminating a parent's rights, it need only be sustainable on one statutory ground. *See Jesus M.*, 203 Ariz. 278, ¶ 3, 53 P.3d at 205 (appellate court need not consider challenge on alternate grounds for severance if evidence supports any one ground).

¶5 Next, Aracely asserts she was deprived of her due process right to a fair and impartial trier of fact. She contends the court's comments at the termination hearing about her prior abusive behavior and her ability to properly parent in the future did "not reflect a dispassionate, impartial trier of fact" but rather exposed "a judge who harbored

ill will against" her. Aracely did not raise the issue of bias below and generally, "[a]bsent a finding of fundamental error, failure to raise an issue at trial . . . waives the right to raise the issue on appeal." *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991); *see also State v. Schackart*, 190 Ariz. 238, 256, 947 P.2d 315, 333 (1997) (defendant "waived" claim of bias based on "comments allegedly showing the court's irritation with defendant" by failing to raise issue at trial); *Monica C. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 89, ¶ 23, 118 P.3d 37, 42 (App. 2005) (applying fundamental error doctrine in severance case). *But see Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988) ("The doctrine of fundamental error is sparingly applied in civil cases and may be limited to situations . . . [that] deprive[] a party of a constitutional right."). Nevertheless, the statements about which Aracely complains do not show "a deep-seated favoritism or antagonism," *State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997), *quoting Liteky v. United States*, 510 U.S. 540, 555-56 (1994), or a "spirit of ill-will" necessary to overcome the strong presumption against a trial court's bias. *State v. Cooper*, 205 Ariz. 181, ¶ 22, 68 P.3d 407, 411 (2003), *quoting In re Guardianship of Styer*, 24 Ariz. App. 148, 151, 536 P.2d 717, 720 (1975). As ADES points out, although the judge could have expressed his conclusions "without the additional commentary about which [Aracely] complains," his comments were based on evidence presented at the hearing and do not indicate bias or prejudice or support a conclusion that Aracely did not receive a fair trial. *See Henry*, 189 Ariz. at 546, 944 P.2d at 61.

¶6 We last address Aracely's contention the juvenile court "err[ed] by permitting the on-going case manager[, JoAnn Smith,] to remain in the courtroom" over her objection, when the rule of exclusion of witnesses had been invoked and ADES had designated its investigating case manager, Sarah Curiel, as its representative pursuant to Rule 615(2), Ariz. R. Evid. She concedes that Rule 615(3) also exempts from exclusion "a person whose presence is shown by a party to be essential to the presentation of the party's cause." *See State v. Williams*, 183 Ariz. 368, 380, 904 P.2d 437, 449 (1995). But she contends ADES made no such showing in this case, stating only its preference for Smith's presence in response to Aracely's objection.

¶7 Here, however, we need not determine whether the juvenile court erred in allowing Smith to stay in the courtroom and then later testify, because Aracely has shown no prejudice resulting from the court's ruling.[1] *See Kosidlo v. Kosidlo*, 125 Ariz. 32, 35, 607 P.2d 15, 18 (1975) (wrongful failure to exclude witness does not require reversal unless prejudicial), *disapproved on other grounds*, 125 Ariz. 18, 607 P.2d 1 (1979). She suggests she was prejudiced because "Smith was the only competent witness to testify to the child's best interests, which is an essential element to any severance action." First, we note that Curiel, who was not only the investigating case manager, but also the supervising case manager once Smith was assigned to the case, also provided sufficient testimony to support the court's finding that termination of Aracely's parental rights was in the child's best interests. But whether a witness excepted from the sequestration rule

[1]Nor need we address ADES's contention that Rule 615(2) permits the designation of more than one representative in a juvenile case.

supplies relevant or even crucial evidence is not the test for the existence of prejudice. The purpose of the witness sequestration rule is to prevent "fabrication, inaccuracy, and collusion." Fed. R. Evid. 615 advisory committee's note; *see Kosidlo*, 125 Ariz. at 35, 607 P.2d at 18 ("The source of our Rule 615 is the counterpart federal rule."). Aracely has shown no evidence of any of these resulting from Smith having been allowed to remain in the courtroom before her testimony.

¶8 We find no error or abuse of discretion warranting reversal. Thus, we affirm the juvenile court's termination order.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge